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Nos. 05-5064, 05-5095 through 05-5116
Nos. 05-5062, 05-5063

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KHALED A.F. AL ODAH, et al.,
Petitioners-Appellees/Cross-Appellants,
v.
UNITED STATES OF AMERICA, et al.,
Respondents-Appellants/Cross-Appellees.

LAKHDAR BOUMEDIENE, et al.,
Petitioners-Appellants,
v.
GEORGE W. BUSH, et al.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE FEDERAL PARTIES ADDRESSING THE DETAINEE TREATMENT ACT OF 2005

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GLOSSARY

ARB . . . . . Administrative Review Board

AUMF . . . . . Authorization for Use of Military Force

CSRT . . . . . Combatant Status Review Tribunal

DTA . . . . . Detainee Treatment Act

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF OF THE FEDERAL PARTIES ADDRESSING THE DETAINEE TREATMENT ACT OF 2005

Congress enacted Section 1005 of the Detainee Treatment Act in response to hundreds of habeas corpus actions filed by or on behalf of aliens held as enemy combatants at Guantanamo Bay, Cuba. Section 1005 creates an exclusive-review scheme for such cases to proceed in this Court, and divests the courts of habeas

jurisdiction over the cases. The exclusive-review scheme is expressly applicable to pending cases, and the ouster of habeas jurisdiction makes no reservation for pending cases.

Petitioners contend that Section 1005 is inapplicable to any of the pending habeas cases. They note that the exclusive-review scheme does not specifically use the words "habeas corpus," and that the ouster of habeas jurisdiction does not specifically mention pending cases. But petitioners ignore the basic architecture of Section 1005 – a single statute that both expressly repeals habeas jurisdiction and makes its exclusive replacement expressly applicable to pending cases. Petitioners also ignore Congress's manifest objective of responding to the habeas litigation crisis that has been burdening the courts and frustrating military operations during an ongoing armed conflict.

Petitioners further contend that Section 1005 violates the Suspension Clause. But as aliens outside the sovereign territory of the United States, petitioners have no constitutional rights under the Suspension Clause or otherwise. That constitutional holding of Johnson v. Eisentrager, 339 U.S. 763 (1950), remains undisturbed by the statutory holding of Rasul v. Bush, 542 U.S. 466 (2004). In any event, petitioners have been determined to be enemy combatants by military Combatant Status Review Tribunals (CSRTs), which used adjudicatory procedures constitutionally sufficient

under Hamdi v. Rumsfeld, 542 U.S. 507 (2004). Moreover, petitioners may raise constitutional and other legal challenges to their CSRT determinations in this Court, and even may contend that the CSRT failed to follow its own procedures. That degree of judicial review satisfies any possible Suspension Clause standard.

Finally, petitioners contend that this Court cannot convert these habeas appeals into petitions for review under the Act. But this Court has subject-matter jurisdiction under Section 1005(e)(2), and Congress anticipated that these appeals would be treated as petitions for review under Section 1005(e)(2) and decided expeditiously. No apparent purpose would be served by dismissing the appeals in their entirety, only to have petitioners immediately re-file and then re-litigate from scratch the significant constitutional questions that already have been briefed and argued to this Court.

I. THE DETAINEE TREATMENT ACT APPLIES TO, AND RESTRICTS JURISDICTION IN, THESE PENDING CASES

A. This Court's Exclusive Jurisdiction To Review Challenges To CSRT Determinations Expressly Applies To Pending Cases

Section 1005(e)(2) of the Act gives this Court "exclusive jurisdiction" to determine the validity of "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and Section 1005(h)(2) makes that grant of exclusive jurisdiction expressly applicable to claims "governed by" Section 1005(e)(2) and "pending on or after the date of the enactment" of the Act.

As explained in our opening brief, these provisions encompass petitioners' claims and thus foreclose the exercise of habeas jurisdiction in these cases. Petitioners' objections to these points are meritless.

1. Petitioners first contend that the grant of "exclusive" jurisdiction in Section 1005(e)(2) cannot preclude resort to habeas corpus because Section 1005(e)(2) does not specifically use the phrase "habeas corpus." See Al Odah Supp. Br. 22-23; Boumediene Supp. Br. 27-30. Petitioners invoke INS v. St. Cyr, 533 U.S. 289, 299 (2001), for the proposition that Congress must give a "clear statement" in order to "repeal habeas jurisdiction." Petitioners' reliance on that principle is misplaced.

Petitioners err in seeking to construe Section 1005(e)(2) entirely apart from Section 1005(e)(1), which expressly amends the habeas statute to provide in pertinent part that "no court, justice, or judge shall have jurisdiction to hear or consider * * * an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Construed together, Section 1005(e)(1) and Section 1005(e)(2) make clear that Congress, in seeking to address "judicial review of detention of enemy combatants," § 1005(e), intended to replace "habeas corpus" with the "exclusive jurisdiction" granted by Section 1005. In addressing another clear-statement rule, the Supreme Court stressed that "our cases have never required that Congress make its clear statement in a single section or in

statutory provisions enacted at the same time." Kimel v. Florida Board of Regents, 528 U.S. 62, 76 (2000). In different subsections of the same statutory section, Congress could and did make a clear statement to replace "habeas" jurisdiction with an "exclusive" alternative scheme.

Even in isolation, Section 1005(e)(2) speaks with sufficient clarity to foreclose resort to habeas. St. Cyr involved one provision that consolidated all available "judicial review" of removal orders in the courts of appeals, and another that eliminated all "jurisdiction to review" removal orders against certain criminal aliens. See 533 U.S. at 311-12. The Supreme Court held that these provisions did not preclude covered criminal aliens from obtaining review through habeas. In so doing, the Court invoked not only the "rule requiring a clear statement of congressional intent to repeal habeas jurisdiction," but also the "strong presumption in favor of judicial review of administrative action" and the desire to avoid "substantial constitutional questions" that might have arisen had the disputed provisions been construed to "entirely preclude review of a pure question of law by any court." See id. at 298-300. St. Cyr did not suggest that only the words "habeas corpus" could preclude resort to habeas corpus. To the contrary, the Court stressed that, if it were "clear that the question of law" on which the alien had sought review "could be answered in another judicial forum," then an interpretation of the terms "judicial

review" or "jurisdiction to review" to preclude resort to habeas "might be permissible." Id. at 314.

This case presents none of the interpretive considerations that were dispositive in St. Cyr. Section 1005(e)(2) precludes resort to habeas but creates "exclusive jurisdiction" for obtaining review by other means. It therefore does not foreclose judicial review of administrative action. Nor does Section 1005(e)(2) raise avoidance concerns: Unlike the provisions in St. Cyr, Section 1005(e)(2) governs only the claims of aliens outside the sovereign territory of the United States. And far from precluding review in any court of pure questions of law, Section 1005(e)(2)(C)(ii) expressly authorizes this Court to decide those questions. As explained in our opening supplemental brief and below, those considerations eliminate any colorable Suspension Clause concerns.

Consistent with this analysis, several courts of appeals have held that the exclusive-review provisions at issue in St. Cyr, insofar as they afford review to non-criminal aliens, preclude resort to habeas. See, e.g., Laing v. Ashcroft, 370 F.3d 994, 999-1000 (9th Cir. 2004); Lopez v. Heinauer, 332 F.3d 507, 510-11 (8th Cir. 2003); Gomez-Chavez v. Perryman, 308 F.3d 796, 799-800 (7th Cir. 2002). Petitioners contend that these cases rest entirely on principles of exhaustion or procedural default. That account is not only unpersuasive but also unhelpful to petitioners, who

seek to bypass entirely the exclusive-review scheme that Congress has made available to them.

2. Petitioners further contend that the exclusive-review scheme created by the Act, which permits review of "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," § 1005(e)(2)(A), does not encompass review of the hundreds of existing CSRT determinations. Their contention that the exclusive-review scheme governs a presently null-set of cases is nonsensical given the circumstances surrounding the Act's passage. It is also inconsistent with the text of the Act, which makes the exclusive-review scheme applicable to claims challenging "any" final CSRT decision, ibid., including "any claim[s]" that are "pending on * * * the date of [its] enactment," § 1005(h)(2).

Petitioners give no meaningful content to the inclusion within Section 1005(h)(2) of any claims "pending on" the date of its enactment. In a footnote, they note that Section 1005(h)(2) governs pending claims challenging both final CSRT determinations and final military-commission convictions, the latter of which is a presently null-set of cases. See Al Odah Supp. Br. 17-18 n.25. That observation cuts against petitioners, for it underscores that Section 1005(h)(2) must have some meaningful application to pending cases challenging final CSRT determinations. Petitioners speculate that Congress might have expected the Department of Defense

to re-do hundreds of past CSRTs, in order to conform to future CSRT procedures contemplated in the bill that became Section 1005, prior to the enactment of Section 1005. Not a word of text (or legislative history) supports that fantastic suggestion. Petitioners also err in urging (Al Odah Supp. Br. 17) that Section 1005(e)(2)(B)(ii) restricts the exclusive-review scheme to future CSRTs. That provision limits the scheme to CSRTs conducted "pursuant to applicable procedures specified by the Secretary of Defense." Petitioners' past CSRTs obviously meet that requirement.

Petitioners respond that application of the exclusive-review scheme to all final CSRT determinations, consistent with the terms of Section 1005(e)(2)(A), would reduce Sections 1005(e)(2)(B) and 1005 (e)(2)(C) to surplusage. See Al Odah Supp. Br. 18. That is incorrect. Section 1005(e)(2)(B) provides that this Court may review final CSRT determinations, but only if the petitioner remains detained at Guantanamo Bay when filing his petition for review. Section 1005(e)(2)(C) addresses the scope of this Court's review. Each provision imposes meaningful limits on this Court's review of CSRT determinations, whether rendered in the past or future.

Petitioners next assert that restricting the exclusive-review scheme to future CSRTs makes sense in light of three specific CSRT provisions prospectively mandated by Congress. See Al Odah Supp. Br. 19-22. That contention is not textually defensible, as we have shown, and is also unconvincing on its own terms.

First, petitioners cite the fact that any future CSRT determination will be subject to the review of a designated civilian official. See § 1005(a)(2). But that provision simply codifies and extends to any future CSRTs the "designated civilian officer" review that the Department of Defense already had instituted for Administrative Review Boards (ARBs). See Administrative Review Implementation Directive, http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf. The extension of that review to any future CSRT determinations cannot reasonably be read as implicitly nullifying the results of all past CSRT determinations – which themselves have been subjected to multiple layers of review. Al Odah JA 1202.

Second, petitioners claim that periodic status review is a significant improvement over existing ARB process, which they say has "nothing to do" with the enemy combatant status of a detainee (Al Odah Supp. Br. 21). In fact, the existing ARB process includes "an assessment of all relevant information on enemy combatants." ARB Implementation Directive, supra, encl. 2. Moreover, petitioners' future ARBs will conform to the statute in any event.

Third, petitioners assert that the new procedures, but not the old ones, categorically prohibit consideration of evidence procured by coercion. That is incorrect. The Act simply requires future CSRTs, "to the extent practicable," to "assess" both (A) whether any statement by or about a detainee "was obtained as a

result of coercion" and (B) the "probative value (if any) of such statement." § 1005(b)(1). In that respect, the future CSRT standard – "probative value" taking into account coercion to the extent practicable – is not materially different from the inquiry conducted by past CSRTs into whether hearsay evidence is "relevant and helpful * * * taking into account the reliability of such evidence in the circumstances." Al Odah JA 1189. Nor is it materially different from the admissibility standard used by the military commission in Yamashita v. Styer, 327 U.S. 1 (1946), which considered hearsay evidence "as in its opinion would be of assistance." Id. at 18.

Finally, petitioners urge that Section 1005(e)(2) is inapplicable because their "habeas cases do not challenge the validity of any decision of a CSRT; rather, they challenge unlawful detention." Boumediene Supp. Br. 31. But it is settled law that individuals properly classified as enemy combatants may be detained as such, see Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004), and the CSRTs were created precisely "to determine, in a fact-based proceeding, whether [petitioners] are properly classified as enemy combatants," Al Odah JA 1191. In challenging their detention, petitioners necessarily challenge CSRT determinations that they are enemy combatants.

Section 1005(e)(2) expressly applies to review of claims challenging "any" CSRT determination and "pending on" the date of its enactment. Petitioners give no

plausible justification for rendering that provision entirely inapplicable to the hundreds of pending habeas actions that precipitated its enactment.

B. The Act Eliminates Habeas Jurisdiction Without Any Reservation For Pending Cases

Section 1005(e)(1) of the Act amends the habeas statute to state in pertinent part that, "[e]xcept as provided in Section 1005" itself, "no court, justice, or judge shall have jurisdiction to hear or consider" either (1) "an application for a writ of habeas corpus" filed by or on behalf of a Guantanamo detainee or (2) "any other action * * * relating to any aspect of the detention" of a Guantanamo detainee. Without reservation for pending cases, Section 1005(h)(1) provides that Section 1005(e)(1), among other provisions, "shall take effect on the date of the enactment of this Act." Under settled interpretive principles, because Section 1005(e)(1) ousts jurisdiction without reservation for pending cases, it applies to pending cases. See, e.g., Bruner v. United States, 343 U.S. 112, 115-17 (1952); Hallowell v. Commons, 239 U.S. 506, 508-09 (1916); La Fontant v. INS, 135 F.3d 158, 161-62 (D.C. Cir. 1998). Moreover, because jurisdictional statutes govern the future exercise of adjudicatory power, such immediate application is not retroactive. See Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994); id. at 293 (Scalia, J., concurring in the judgment). Finally, the jurisdictional ouster under Section 1005(e)(1) works in

tandem with the exclusive-review scheme under Section 1005(e)(2), which expressly applies to pending cases.

Petitioners quote Landgraf for the proposition that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date" (511 U.S. at 257). See Al Odah Supp. Br. 12; Boumediene Supp. Br. 13. That proposition is irrelevant here. We do not contend that the Act, to the extent that it became effective upon enactment, somehow governs past CSRT procedures. Rather, we contend that Section 1005(e)(1), to the extent that it ousts jurisdiction without reservation for pending cases, immediately governs the future exercise of judicial power in such cases. Landgraf itself confirms that proposition. See 511 U.S. at 274 ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed.").

Petitioners object that the temporal scope of Section 1005(e)(1) is less clear than that of the Real ID Act of 2005, which stated that its ouster of habeas jurisdiction in immigration cases "shall take effect on the date of the enactment * * * and shall apply to all cases pending before any court on or after such date," Pub. L. No. 109-13, Div. B, § 101(h)(4), 119 Stat. 231, 306 (2005). See Al Odah Supp. Br. 14. Again petitioners ignore the combined operation of Section 1005(e)(1), which ousts

jurisdiction "[e]xcept as provided" in Section 1005(e)(2), which in turn creates an "exclusive" scheme of review that expressly applies to pending cases. In any event, with respect to Section 1005(e)(1) in particular, the Bruner line of cases themselves set forth a "predictable background rule against which to legislate." See Landgraf, 511 U.S. at 273.

Petitioners' principal contention is that, for purposes of statutory retroactivity analysis, Section 1005(e)(1) is substantive under Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997), rather than jurisdictional under Bruner and Hallowell. See Al Odah Supp. Br. 23-28; Boumediene Supp. Br. 15-21. As explained in our opening supplemental brief, that contention is mistaken – most obviously because Section 1005, in replacing habeas jurisdiction with the exclusive-review scheme established in Section 1005(e)(2), simply shifts jurisdiction from one judicial forum to another. In that respect, it is more akin to the jurisdiction-ousting or jurisdiction-allocating provisions at issue in Bruner and Hallowell than to the jurisdiction-creating provisions at issue in Hughes. To the extent petitioners object that the adjudicatory procedures used by this Court differ from those used by a district court in habeas, they ignore the fact that changing the forum almost inevitably affects the governing procedures. Nonetheless, the Supreme Court routinely has applied jurisdiction-ousting statutes to pending cases without separately addressing incidental

procedural effects. See, e.g., Bruner, 343 U.S. at 114-16 (shift from district-court jurisdiction to Court of Claims jurisdiction); Sherman v. Grinnell, 123 U.S. 679, 680 (1887) (shift from district-court jurisdiction to state-court jurisdiction). That makes sense because changes in procedural rules, like changes in the jurisdiction of courts, "regulate secondary rather than primary conduct," and thus presumptively apply to the adjudication of cases pending on the date of their enactment. See Landgraf, 511 U.S. at 274-75. Finally, petitioners contend that the scope-of-review provisions in Section 1005(e)(2)(C) should be treated as substantive for retroactivity purposes. Whatever their proper characterization, however, Section 1005(h)(2) expressly makes those provisions applicable to pending cases.

Petitioners' characterization of Section 1005(e)(1) as substantive would be mistaken even if Section 1005(e)(2) did not provide an alternative judicial forum. Each petitioner has received a formal adjudication of his enemy combatant status before a duly constituted military tribunal, under procedures affording more protections than those that would be constitutionally sufficient under Hamdi v. Rumsfeld, 542 U.S. 507 (2004), to justify the detention of citizen enemy combatants within the United States. The fact that the CSRT procedures might differ from those used by a habeas court in the enemy combatant context (despite the various cautions expressed in Hamdi) is simply immaterial for retroactivity purposes. Indeed, both

Hallowell and LaFontant gave immediate effect to ousting statutes that left the aggrieved party with only an administrative forum. In Hallowell, the ousting statute revoked federal-court jurisdiction over certain Indian probate determinations – and vested "final and conclusive" authority for those decisions in the Secretary of Interior. See 239 U.S. at 508. The Supreme Court nonetheless concluded that the statute "takes away no substantive right, but simply changes the tribunal that is to hear the case." Ibid. Similarly, in LaFontant, the ousting statute eliminated jurisdiction to review certain deportation orders. Applying Hallowell, this Court concluded that a "jurisdictional change from an Article III court to an administrative decision maker is simply a change in the 'tribunal that is to hear the case.'" See 135 F.3d at 162 (citation omitted). Neither case even addressed the extent of process available in the administrative tribunal, which obviously would have differed from that available in an Article III court.

C. Petitioners' Other Arguments For Continuing Habeas Jurisdiction Lack Merit

1. The combined operation of Section 1005(e)(2), which creates an exclusive-review scheme expressly applicable to pending cases, and Section 1005(e)(1), which repeals habeas jurisdiction without reservation for pending cases, makes particularly obvious the applicability of Section 1005 to these cases. Petitioners nonetheless

contend the opposite. They attempt to contrast the effective-date provision for the exclusive-review scheme, which applies to covered claims "pending on or after the date of the enactment," § 1005(h)(2), with the effective-date provision for the habeas ouster, which omits that specific language, but instead states – without reservation for pending cases – that the ouster "shall take effect on the date of the enactment," § 1005(h)(1). From all of this, petitioners would conclude, by negative implication, that the habeas ouster does not apply to claims "pending on" the date of enactment. See Boumediene Supp. Br. 13.

This line of argument is mistaken. To begin with, the rule that jurisdiction-ousting provisions are immediately effective absent an express reservation for pending cases has been settled for over a century. See, e.g., Bruner, 343 U.S. at 116-17 (stating that principle as a "rule * * * adhered to consistently"). Congress "expects its statutes to be read in conformity with this Court's precedents," United States v. Wells, 519 U.S. 482, 495 (1997), and can hardly be faulted for relying on Bruner's "predictable background rule against which to legislate," Landgraf, 511 U.S. at 273. On the other hand, Congress had no such "predictable background rule" with respect to the exclusive-review schemes for CSRT determinations and military-commission judgments. Because those schemes set forth scope-of-review provisions that are at least arguably substantive for retroactivity purposes, see Lindh v. Murphy, 521 U.S.

320, 327 (1997), Congress sensibly confirmed that those new schemes should govern pending cases. And the decision to apply a scheme of "exclusive" review to pending cases does not itself suggest the wholly incompatible objective of preserving habeas jurisdiction over the same class of cases. To the contrary, it suggests precisely the opposite.[1]

2. We have shown that our construction of Section 1005 is supported by the consistent statements of its principal sponsors, by the understanding of the President who signed the provision into law, and by the historical context in which it was enacted. We also showed that petitioners' competing support consists of various inconsistent statements by Senator Levin, and isolated other statements by a few Senators who voted against Section 1005. In response, petitioners assert that Senators Graham and Kyl did not articulate their present position until after November 15, 2005, when the Senate voted to insert Section 1005 into the Detainee Treatment Act, and that Senator Levin consistently advocated his present position on and before that date. See Boumediene Supp. Br. 21-26. Neither proposition is true.

[1] As explained in our opening supplemental brief, petitioners err for similar reasons in claiming support (Boumediene Supp. Br. 13-14) from Lindh.

On November 10, 2005, Senators Graham and Kyl made emphatically clear their strong desire to replace habeas jurisdiction, in the pending Guantanamo detention cases, with an exclusive-review scheme in this Court. See, e.g., 151 Cong. Rec. S12652, S12657 (Sen. Graham) ("There are 500-some people down there, and there are 160 habeas corpus petitions in Federal courts throughout the United States. * * * We cannot run the place."); id. at S12657 (Sen. Graham) ("we allow a detainee to go to Federal court, not anywhere and everywhere, but to one place, the Circuit Court of Appeals for the District of Columbia where they can challenge * * * their status"); id. at S12660 (Sen. Kyl) ("We are not going to clog up the courts with habeas corpus petitions. You can have an automatic right to the circuit court of appeals."). In response, Senator Levin objected that the original amendment afforded no review of military-commission judgments, but he also stated: "I have no great problem in substituting the court [of appeals] review for habeas corpus relative to those determinations of status. I think that is a fair substitute because at least there is a court review." Id. at S12664.

On November 14, Senator Graham introduced a substitute amendment, co-sponsored by Senator Levin, that became Section 1005 without material changes. Both Senators indicated that the provision would govern pending habeas challenges to CSRT decisions. Senator Graham explained: "Instead of having unlimited habeas

corpus opportunities * * * we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia." 151 Cong. Rec. S12752, S12754. Senator Levin stated that the "major change in the amendment" was the addition of "a direct appeal for convictions by military commissions." See id. He further stated that the amendment set forth "substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this enactment." Id. at S12755.

Finally, on November 15, the Senate passed the amendment. Senator Graham continued to stress the urgency of addressing the hundreds of pending habeas cases. See 151 Cong. Rec. S12777, S12799 (Guantanamo detainees should not "have access to our Federal courts under habeas"). Senator Durbin opposed the amendment precisely because it applies to pending cases, and thus would "likely prevent the Supreme Court from ruling on the merits of the Hamdan case." Ibid. Senator Leahy was similarly opposed because the amendment "would attempt to stop" these pending habeas cases and Hamdan. See id. at S12802. Finally, Senator Levin took the seemingly inconsistent position that pending cases could continue as habeas corpus actions, but would nonetheless be governed by the scope-of-review provisions in the Act. See id. ("The Graham-Levin-Kyl amendment would not apply the habeas prohibition in paragraph (1) to pending cases. So, although the amendment would

change the substantive law applicable to pending cases, it would not strip the courts of jurisdiction to hear them").

Nothing in this record remotely supports petitioners' attempts to overcome the clear text of Section 1005, settled interpretive presumptions, the consistent views of most Senators, and Congress's obvious desire to address what it rightly perceived to be a habeas litigation crisis. Petitioners' interpretation of Section 1005 – to apply to none of the hundreds of pending habeas actions that gave rise to the Act, and only to a speculative and presently-null set of possible future challenges by possible future detainees to possible future CSRT determinations – would be entirely nonsensical.

II. THE ACT DOES NOT VIOLATE THE SUSPENSION CLAUSE

In our opening supplemental brief, we showed that petitioners, as aliens held outside the sovereign territory of the United States, have no constitutional rights under the Suspension Clause (and, until recently, had no rights under the habeas statute either). We further showed that, in any event, Section 1005(e)(2) provides an adequate substitute for habeas jurisdiction. Petitioners resist both conclusions.

A. In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court held that aliens outside the sovereign territory of the United States have no constitutional rights under the Suspension Clause or the Fifth Amendment. In rejecting a contention that aliens detained abroad have a "constitutional right, to sue in some court of the

United States for a writ of habeas corpus," the Court explained that "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection." Id. at 777-78. The Court stressed that constitutional habeas rights for aliens abroad would be particularly inappropriate with respect to military detention during times of armed conflict. See id. at 778-79. And the Court further rejected the "extraterritorial application" of the Fifth Amendment to aliens. See id. at 784-85 ("extraterritorial application of organic law" to aliens would be inconceivable).

Subsequent decisions of the Court have repeatedly reaffirmed Eisentrager's constitutional holding. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Court relied upon Eisentrager in holding that the Fourth Amendment does not apply to searches of alien property abroad. See id. at 273 ("Not only are history and case law against [the alien], but as pointed out in [Eisentrager], the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."). The Court again reaffirmed the constitutional holding of Eisentrager in Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Following these precedents, this Court consistently has held that a "'foreign entity without property or presence in this country has no constitutional rights, under the

due process clause or otherwise.'" 32 County Sovereignty Comm. v. Department of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (citation omitted) .

Petitioners contend that Rasul limited the constitutional holding of Eisentrager to its facts. See Al Odah Supp. Br. 32; Boumediene Supp. Br. 37-38. That is incorrect. In extending habeas corpus to aliens at Guantanamo Bay, Rasul rested entirely on the federal habeas statute. The Court explicitly distinguished between the constitutional and statutory holdings of Eisentrager. See 542 U.S. at 475-76. It rested its analysis entirely on two statutory points: the evolving judicial interpretation of the phrase "within their respective jurisdictions" as used in the habeas statute, see id. at 477-79, and the fact that the "statute draws no distinction between Americans and aliens in federal custody," see id. at 481-82. The Court clearly stated its bottom-line: "We therefore hold that § 2241 confers upon the Court jurisdiction to hear petitioners' habeas corpus challenges * * * * " Id. at 484. To be sure, the Court also stated – in explaining what was not at issue – that "six critical facts" in Eisentrager (including the petitioners' prior conviction by military commission) were "relevant only to the question of the prisoners' constitutional entitlement to habeas corpus." Id. at 476. On its face, that observation is not a constitutional holding at all, much less an unreasoned and elliptical overruling of decades of settled precedent. On petitioners' view, Rasul effectively held that habeas practice during the first two

centuries of our Nation's history – until Braden v. 30th Judicial Circuit County of Kentucky, 410 U.S. 484 (1973), if not Rasul itself – has violated the Suspension Clause. Not a word in Rasul suggests that remarkable conclusion.

Petitioners alternatively contend that Rasul effected a major constitutional overruling through its discussion of common-law habeas. See Al Odah Supp. Br. at 32-33; Boumediene Supp. Br. at 35-37. That claim fares no better. Petitioners suggest the Court concluded that, at common law, habeas jurisdiction would have extended to aliens in controlled jurisdictions outside the sovereign territory of England. In fact, what the Court said was that "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called 'exempt jurisdictions,' where ordinary writs did not run, and all other dominions under the sovereign's control." 542 U.S. at 481-82 & nn. 11-13 (footnotes omitted). The cited cases involving "persons" outside the "sovereign territory of the realm" all involved British subjects. See id. at 481-82 nn. 12-13. The Court thus rested not on the historic availability of habeas to aliens abroad, but on its historic availability to citizens abroad in controlled territories, plus the fact that the habeas "statute draws no distinctions between Americans and aliens." See id. at 481-82. And although the majority and the dissent debated at length the import of precedents decided in 1939

and 1960 respectively, see id. at 482 n.14, that debate is no more relevant to the constitutional scope of habeas than is the debate about whether the habeas statute was first effectively extended to aliens abroad in 1973 or 2004. See, e.g., Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 47 U. Chi. L. Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.").

B. Even if petitioners have rights under the Suspension Clause, the Act affords a constitutionally adequate substitute for habeas. Petitioners contend that, because they have not been criminally convicted, habeas entitles them to a "searching factual inquiry" – including apparently discovery and a de novo judicial trial – into whether or not they are enemy combatants. See Boumediene Supp. Br. at 42-45; Al Odah Supp. Br. at 36-42.

Petitioners' assertion that habeas constitutionally mandates a "searching factual inquiry" by a district court, on top of the factual inquiry already conducted by the CSRTs, is simply wrong. In habeas review, the Supreme Court has afforded decisions by military commissions even greater deference than that given to ordinary criminal convictions. Thus, it has limited habeas review to the question whether the

military commission had jurisdiction over the charged offender and offense. See Eisentrager, 339 U.S. at 786 ("It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission."); Yamashita, 327 U.S. at 8 ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); id. at 17 ("We do not here appraise the evidence on which petitioner was convicted" because such a question is "within the peculiar competence of the military officers composing the commission and were for it to decide."); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.").

For deference purposes, military commissions are no different from CSRTs. Both implement critical warmaking powers of the Executive Branch. See, e.g., Hamdi, 542 U.S. at 518 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war'" (quoting Quirin, 317 U.S. at 28)). In the present conflict, both have been legislatively approved by the Detainee Treatment

Act, which provides for limited and precisely-calibrated review of CSRT determinations and military-commission judgments. To be sure, the Act does not specify in elaborate detail the appropriate procedures for CSRT determinations or military-commission trials. But Congress has never sought to intensively regulate this aspect of Executive Branch authority. See, e.g., 10 U.S.C. § 836 (President may establish procedures cases triable to military commissions).

Petitioners' contention that they have a constitutional habeas right to a sweeping factual inquiry in district court cannot be reconciled with Hamdi. In that habeas action, the Supreme Court addressed the extent of process due to an American citizen held in this country as an enemy combatant. The controlling opinion acknowledged the "weighty" and "sensitive" government interests in capturing and detaining enemy combatants. 542 U.S. at 531 (plurality). It further acknowledged that "core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." Id. at 531. Accordingly, it explained that "an appropriately authorized and properly constituted military tribunal" could permissibly make enemy combatant determinations. See id. at 538.

The scope of review under Section 1005(e)(2) is more than sufficient to satisfy any constitutional rights of petitioners. Section 1005(e)(2)(C)(ii) preserves review

for constitutional and other legal claims. That by itself is sufficient under Quirin and Yamashita. It is also consistent with traditional habeas practice, under which "pure questions of law" were generally reviewable, but, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." St. Cyr, 533 U.S. at 305-06. Moreover, Section 1005(e)(2)(C)(i) permits review of a category of claims that Yamashita otherwise would have barred – whether the CSRT, in reaching its decision, complied with its own procedures, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." In the enemy combatant context, these provisions are more than constitutionally sufficient.

Petitioners also contend that the Act is an inadequate substitute because this Court's review does not extend to the ARB decisions. See Boumediene Supp. Br. at 50-51. Even outside the military context, however, there is no constitutional or habeas right to factual re-examination on a periodic basis. See, e.g., Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (restrictions on successive petitions do not violate Suspension Clause). The decisions by Congress and the Department of Defense to afford petitioners annual administrative hearings on issues related to their continued detention in no way suggests that traditional habeas courts would do so, much less that the failure to do so would be unconstitutional.

III. THE COURT MAY CONVERT PETITIONERS' HABEAS APPEALS INTO PETITIONS FOR REVIEW UNDER THE ACT

This Court should convert the pending appeals into petitions for review under Section 1005(e)(2), and then adjudicate the cases under that provision. As we have shown, the Fifth Amendment, Article II, and Authorization for Use of Military Force issues raised in the pending appeals fall within the exclusive-review scheme established by Section 1005(e)(2)(A) and within the scope of review set forth in Section 1005(e)(2)(C)(ii). Moreover, these issues already have been briefed and argued to this Court. Because Section 1005(e)(1) eliminates any basis for the continuing exercise of district-court jurisdiction, this Court also should vacate the district court judgments and order dismissal of the habeas cases pending in the district court for lack of jurisdiction. Finally, because Section 1005(e)(4) states that "[t]he Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection," the Court should order the dismissal of all other named respondents from the case – including specifically the President, who is an improper respondent on numerous independent grounds as well.

Petitioners oppose conversion, but they do not contend that it would be unfair or inefficient. Nor do petitioners explain why they favor the seemingly pointless

exercise of having these cases dismissed, only to be re-filed under Section 1005(e)(2) and then re-litigated from scratch. Nor do petitioners dispute that Congress specifically contemplated the conversion of these appeals. See, e.g., 151 Cong. Rec. S14260, S14263 (Dec. 21, 2005) (Sen. Graham) ("if, for example, a habeas action currently is in the D.C. Circuit, that court can simply construe that action as a request for review of the detainee's CSRT classification pursuant to subsection (e)"). Instead, petitioners contend only that this Court lacks the power to convert their habeas appeals into petitions for review under the Act. See Boumediene Supp. Br. at 56-57; Al Odah Supp. Br. at 43-44.

Petitioners are mistaken. This Court has subject-matter jurisdiction to proceed, because Section 1005(e)(2)(A) gives it "exclusive jurisdiction" over the claims raised by petitioners in the underlying appeals. Conversion of the appeals is also consistent with 28 U.S.C. § 1631, which permits a court to transfer a case for want of jurisdiction. In Lopez v. Heinauer, 332 F.3d 507 (8th Cir. 2003), the Court converted a pending and jurisdictionally-barred habeas appeal into a petition fore review under the immigration statutes. It explained: "The odd posture of this case indicates that we should remand it to the district court and direct that court to transfer the case back to us so that we can consider what is already before us in this appeal. We conclude that

it is unnecessary to jump through all of these procedural hoops. For the sake of judicial economy, we will deem this case properly transferred to us." Id. at 511.

Moreover converting the pending appeals would be consistent with the disposition of habeas appeals pending on the date of enactment of the Real ID Act. That Act divested the courts of habeas jurisdiction over removal orders and created an exclusive-review scheme for such orders in the courts of appeals. And although the Act authorized the transfer and conversion of habeas cases pending in district court on the date of enactment, see Real ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(c), 119 Stat. 231, 311 (2005) (court of appeals should treat transferred habeas case "as if it had been filed pursuant to a petition for review"), it was silent on the appropriate treatment of habeas cases pending in the courts of appeals on the date of enactment. Despite that silence, several courts of appeals have held that conversion of such cases is jurisdictionally and prudentially sound. See, e.g., Gittens v. Menifee, 428 F.3d 382, 384-86 (2d Cir. 2005) (per curiam) (collecting cases); id. at 385 (noting "the inefficiency of remanding a case that would, straight away and mechanically, be rerouted back to us for further adjudication").

Absent petitioners' commitment to abandon any claims they might have under the Detainee Treatment Act, the pending habeas appeal should be converted into petitions for review under the Act, the legal questions already briefed and argued

should be decided within the scope of Section 1005(e)(2)(C)(ii), and petitioners should be given an opportunity to raise any new claims they might have within the scope of Section 1005(e)(2)(C)(i).

CONCLUSION

For the foregoing reasons, this Court should convert the pending appeals into petitions for review under Section 1005(e)(2), proceed to decide the pending legal questions to the extent permitted by Section 1005(e)(2)(C)(ii), and order dismissal of the pending district court cases for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 6,833 words (which does not exceed the applicable 7,000 word limit).

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2006, I filed and served the foregoing Reply Brief of the Federal Parties Addressing the Detainee Treatment Act of 2005 by causing an original and fourteen copies to be delivered to the Court via hand delivery, and by causing two paper copies to be delivered to lead counsel of record via Federal Express (or hand delivery, as specified) and e-mail transmission:

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